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Nos. 321, 322

In the Supreme Court of the United States

OCTOBER TERM, 1942

THE CREEK NATION, PETITIONER

v.

THE UNITED STATES

THE SEMINOLE NATION, PETITIONER

v.

THE UNITED STATES

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

ADDITIONAL MEMORANDUM FOR THE UNITED STATES

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At the conclusion of the oral argument in the above cases Mr. Justice Frankfurter asked counsel—

> * * * to refer to other legislation dealing with Indian lands, of any tribe, where Congress has dealt with the question of trespass to Indian lands and the obligations growing out of such wrongs—by whom and for whom the suits would be brought.

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The stated purpose of the inquiry was to ascertain whether Congress had adopted "a uniform policy" in dealing with trespasses to Indian lands.

We have made a careful examination of the statutes and treaties relating to Indian affairs and set forth below the relevant provisions. It must be emphasized, however, that the statutory provisions are gathered from a century of Indian legislation, and that the occasional treaty clauses bearing upon the point are scattered instances drawn from hundreds of treaties containing no such commitments. Moreover, the situation of the various Tribes differed greatly and the treaties were negotiated by a large number of men over a long period of time. For these reasons, it is clear that the scattered provisions which we have found cannot be said to represent any settled policy with respect to remedies for intrusions upon Indian lands. However, we have collected the provisions most nearly relevant in order that the Court may have before it those statutory and treaty provisions which deal affirmatively with the protection of Indian lands and remedies for intrusions.

1. STATUTES

The United States has always respected the possessory rights of Indian tribes to their lands, but such rights have never been thought to include the power to require the United States to bring suits in the Indians' behalf or respond in damages for the trespasses of third persons. Rather, as

stated in Cohen, *Handbook of Federal Indian Law* (1934) p. 306:

> Tribal possessory right may be defined as a power to command the aid of the law against trespassers, coupled with a privilege to use reasonable force in excluding such trespassers. * * *

The tribal possessory right did not differ in essence from the right of any citizen to look to the aid of the government to protect his property. It did not include the additional right to require the government to respond in damages for failure to grant adequate protection, a right which the ordinary citizen does not have against the government. See cases collected in *Nez Perce Tribe of Indians* v. *United States*, 95 C. Cls. 1, 10, certiorari denied, 316 U. S. 686.

To prevent intrusions on Indian lands Congress frequently enacted criminal statutes some of which punish trespasses generally and others of which proscribed particular kinds of trespasses. Cohen, *loc. cit. supra*. Section 11 of the Act of June 30, 1834, 4 Stat. 730 (which became Rev. Stat. 2118) is an example of the former class. It provided:

> Every person who makes a settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe, or surveys or attempts to survey such lands, or to designate any of the boundaries by marking trees, or otherwise, is liable to a penalty of $1,000. The President may, moreover, take such measures and em-

> ploy such military force as he may judge necessary to remove any such person from the lands.[1]

An example of a statute punishing a particular kind of trespass is Section 18 of the Act of June 30, 1902, 32 Stat. 500, which ratified a supplemental agreement with the Creek Tribe of Indians:

> Any person who shall introduce any cattle into the Creek Nation in violation of the provisions of this section shall be deemed guilty of a misdemeanor and punished by a fine of not less than $100, and shall stand committed until such fine and costs are paid, such commitment not to exceed one day for every $2 of said fine and costs; and every day said cattle are permitted to remain in said nation without a permit for their introduction having been obtained shall constitute a separate offense.

The duty of preventing violations of such statutes fell, of course, upon the Executive Department just as does the enforcement of all criminal laws, including those for the protection of property. It was recognized that agents might be appointed, and the Army used, for that purpose. See *United States* v. *Crook*, 179 Fed. 391; *United States* v. *Mullin*, 71 Fed. 682.

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[1] In *United States* v. *Joseph*, 94 U. S. 614, the Court held that the lands of the Pueblo Indians were not within the meaning of the above Act because those Indians held their lands by a right superior to that of the United States, their title dating back to grants made by the Government of Spain before the Mexican Revolution.

Although Congress thus undertook by penal laws to grant the Indians that protection normally given to all private property, it never directed the Executive Department to enforce civil remedies on behalf of the Indians against trespassers[2] or assumed liability for the damages. Neither did Congress enact any legislation authorizing the Indians themselves to pursue civil remedies in the courts.[3] The explanation of the failure to enact legislation dealing with civil remedies is uncertain but it may be that Congress believed that the Indians could prosecute their own suits if they desired. Even in the absence of statute, trespass would lie on an Indian title (see *Marsh* v. *Brooks*, 8 How. 223, 232); and it seems that the various Tribes as well as individual Indians had standing to sue (see Supplemental Memorandum for the United States herein). Thus,

[2] But compare the Act of July 13, 1832, 4 Stat. 576, which contained a provision in Section 2 thereof that:

"* * * the Secretary of War be directed to endeavour to ascertain the names of the persons who committed the depredations upon the property of said Indians [certain Cherokees who had lost stock by spoliation committed by citizens of the United States], and take suitable steps for the prosecution and punishment of such persons; *and also for the recovery of the value of the property plundered or destroyed by them.*" [Italics supplied.]

[3] Section 18 of the Act of June 30, 1902, *supra*, provided that if cattle trespassed upon allotted lands, the owner of the cattle should pay damages to the owner of the lands for the initial trespass and double damages for each subsequent trespass. The Act does not provide how the damages shall be recovered.

in *United States* v. *Joseph*, 94 U. S. 614, 619, Mr. Justice Miller said, speaking for the Court:

> If the defendant is on the lands of the pueblo, without the consent of the inhabitants, he may be ejected, or punished civilly by a suit for trespass, according to the law regulating such matters in the Territory. * * *

And in the case of *Smith* v. *Mosgrove*, 51 Ore. 495, it was held that an Indian might bring an action in the state courts for trespass upon real property which had been allotted to him. The court reasoned that although the Indians were under the protection of the treaties and laws of Congress, their property withdrawn from the operation of state laws, and state courts without jurisdiction over controversies concerning title to Indian allotments, yet it did not follow that an Indian alloftee might not invoke the aid of a state court for protection or enforcement of his personal property rights when invaded by a white person. The court said (p. 972):

> He could not sue in the federal court on the ground of diverse citizenship (*Felix* v. *Patrick*, 145 U. S. 317, 12 Sup. Ct. 862, 36 L. Ed. 719) and his case might not come within federal jurisdiction by reason of the questions involved. It is true that by Sections 2118, 2119, 2124, U. S. Rev. St., the duty and obligation is imposed upon the executive branch of the government to protect Indians residing on a reservation in the possession and occupancy of their land, and

to take such measures and employ such force as may be necessary for that purpose: *United States* v. *Mullin* (D. C.), 71 Fed. 682. But this affords no remedy to the Indian for an injury to his personal or property rights; and he cannot obtain relief therefor through the executive department. This he must do through some court of competent jurisdiction.

The action of trespass does not necessarily involve the question of title (*Newcombe* v. *Irwin*, 55 Mich. 620, 22 N. W. 66), and a trial thereof will not interfere with any of the rights given to the secretary of the interior or the federal court over the Indian or his land.

In the case of the Five Civilized Tribes (two of which were the Creek and Seminole Nations) there is affirmative evidence that Congress believed the Tribes to be competent to manage their civil remedies for trespasses on their lands. Statutes granting powers of eminent domain to railroad companies often provided that the proceedings for the determination of just compensation should have as parties the Indians and the railroads without the intervention of the United States. An example is Section 15 of the Act of February 28, 1902, 32 Stat. 43, 47–48, which is involved in this case. It provided in part:

In case of the failure of any railway company to make amicable settlement with any individual owner, occupant, allottee, tribe, or nation for any right of way or

lands or improvements sought to be appropriated or condemned under this Act, all compensation and damages to be paid to the dissenting individual owner, occupant, allottee, tribe, or nation by reason of the appropriation and condemnation of said right of way, lands, or improvements shall be determined by the appraisement of three disinterested referees, to be appointed by the judge of the United States court, or other court of jurisdiction in the district where such lands are situated, on application of the corporation or other person or party in interest. * * * The referees shall also find in their report the names of the person and persons, tribe, or nation to whom the damages are payable and the interest of each person, tribe, or nation in the award of damages. Before such referees shall proceed with the assessment of damages for any right of way or other lands condemned under this Act, twenty days' notice of the time when the same shall be condemned shall be given to all persons interested, * * *: *Provided*, That such notice to any tribe or nation may be served on the principal chief or governor of the tribe. If the referees can not agree, then any two of them are authorized to and shall make the award. Any party to the proceedings who is dissatisfied with the award of the referees shall have the right, within ten days after the making of the award, to appeal, by original petition, to the United

> States court, or other court of competent jurisdiction, sitting at the place nearest and most convenient to the property sought to be taken, * * *.

See also *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641.

Even more significant is the Curtis Act of June 28, 1898, 30 Stat. 495, which was enacted "for the protection of the people of the Indian territory" (including the Creek and Seminole Nations). It provided:

> SEC. 2. That when in the progress of any civil suit, either in law or equity, pending in the United States court in any district in said Territory, it shall appear to the court that the property of any tribe is in any way affected by the issues being heard, said court is hereby authorized and required to make said tribe a party to said suit by service upon the chief or governor of the tribe, and the suit shall thereafter be conducted and determined as if said tribe had been an original party to said action.

Other sections refer to actions by "any tribe or person."

This statute was involved in *Hargrove* v. *Cherokee Nation*, 129 Fed. 186, and *Brought* v. *Cherokee Nation*, 129 Fed. 192. It shows that Congress believed that the Five Civilized Tribes were competent to pursue civil remedies for trespasses to their lands and thus is a strong indication that Congress never intended the burden to rest

as a legal or equitable obligation upon the United States.[4]

2. TREATIES

We have found no treaty provision relevant to a consideration of the right of Indian tribes to invoke civil remedies against intruders upon tribal lands. *In one instance only* has the United States stipulated that it would pursue civil remedies on behalf of an Indian tribe. In Article III of the Treaty of May 24, 1834, with the Chickasaws, it was provided (7 Stat. 450):

> ART. III. The Chickasaws are not acquainted with the laws of the whites, which are extended over them; and the many in-

[4] Compare the Act of February 19, 1875, 18 Stat. 330, which authorized the Seneca Nation of New York Indians to lease lands within certain reservations and confirmed existing leases. Sections 6 and 7 provided:

"SEC. 6. That all moneys arising from rents under the provisions of this act which shall belong to said Seneca Nation shall be paid to and recoverable by the treasurer of said Seneca Nation, and expended in the same manner and for the same purposes as are other revenues or moneys belonging to said Seneca Nation.

"SEC. 7. That the courts of the State of New York within and for the county of Cattaraugus, having jurisdiction in real actions, and the circuit and district courts of the United States in and for the northern district of said State, shall have jurisdiction of all actions for the recovery of rents and for the recovery of possession of any real property within the limits of said villages, whether actions of debt, ejectment, or other forms of action, according to the practice in said courts; and actions of forcible entry and detainer, or of unlawful detainer arising in said villages, may be maintained in any of the courts of said county which have jurisdiction of such actions."

truders which break into their country, interupting their rights and disturbing their repose, leave no alternative whereby restraint can be afforded, other than an appeal to the military force of the country, which they are unwilling to ask for, or see resorted to; and therefore they agree to forbear such a request, for prevention of this great evil, with the understanding, which is admitted, that *the agent of the United States, upon the application of the chiefs of the nation, will resort to every legal civil remedy,* (at the expense of the United States,) *to prevent intrusions upon the ceded country; and to restrain and remove trespassers from any selected reservations, upon application of the owner of the same.* And it is also agreed, that the United States, will continue some discreet person as agent, such as they now have, to whom they can look for redress of wrongs and injuries which may be attempted against them; *and it is consented, that if any of their property, be taken by persons of the United States, covertly or forcibly, the agent on satisfactory and just complaint being made, shall pursue all lawful civil means, which the laws of the State permit, in which the wrong is done, to regain the same, or to obtain a just remuneration;* and on failure or inability to procure redress, for the offended, against the offending party; payment for the loss sustained, on production of the record, and certificate of the facts, by the agent, shall be made by the United States; but in all

such cases, satisfactory proof, for the establishing of the claim, shall be offered. [Italics added.]

Illustrative of the provisions of early treaties is Article IV of the Treaty of January 10, 1786 with the Chickasaws, which provided (7 Stat. 24):

> If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the lands hereby allotted to the Chickasaws to live and hunt on; such person shall forfeit the protection of the United States of America, and the Chickasaws may punish him or not as they please.

But this policy of turning trespassers over to the Indians seems to have been followed for the most part before the United States recognized that it owed the same kind of governmental obligation to protect Indian property as it owed to citizens.

In some of the subsequent treaties that governmental obligation was expressly stated. The form of the stipulation varied from treaty to treaty as did the extent of the obligation. The following excerpts, however, are fairly illustrative:

1. Cherokee Treaty of July 8, 1817, 7 Stat. 156.

> ART. 12. The United States do also bind themselves to prevent the intrusion of any of its citizens within the lands ceded by the first and second articles of this treaty, until the same shall be ratified by the President and Senate of the United States, and duly promulgated.

2. Quapaw Treaty of August 24, 1818, 7 Stat. 176.

ART. 4. No citizen of the United States, or any other person, shall be permitted to settle on any of the lands hereby allotted to, and reserved for, the said Quapaw tribe or nation, to live and hunt on; yet it is expressly understood and agreed on, by, and between, the parties aforesaid, that, at all times, the citizens of the United States shall have the right to travel and pass freely, without toll or exaction, through the Quapaw reservation, by such roads or routes as now are, or hereafter may be, established.

* * * * *

ART. 6. Least the friendship which now exists between the United States and the said tribe or nation, should be interrupted by the misconduct of individuals, it is hereby agreed, that, for injuries done by individuals, no private revenge or retaliation shall take place; but, instead thereof, complaints shall be made by the party injured, to the other; by the tribe or nation aforesaid, to the governor, superintendent of Indian affairs, or some other person authorized and appointed for that purpose; and by the governor, superintendant, or other person authorized, to the chiefs of the said tribe or nation. And it shall be the duty of the said tribe or nation, upon complaint being made, as aforesaid, to deliver up the person or persons, against whom the complaint is made, to the end that he or they may be punished, agreeably to the laws

of the state or territory where the offence may have been committed;

3. Kickapoo Treaty of July 30, 1819, 7 Stat. 200. Article 7 of that treaty reads:

> ART. 7. The United States promise to guaranty to the said tribe the peaceable possession of the tract of land hereby ceded to them, and to restrain and prevent all white persons from hunting, settling, or otherwise intruding upon it. But any citizen or citizens of the United States, being lawfully authorized for that purpose, shall be permitted to pass and repass through the said tract, and to navigate the waters thereof, without any hindrance, toll, or exaction, from the said tribe.

4. Chickasaw Treaty of October 20, 1832, 7 Stat. 381.

> ARTICLE XV. The Chickasaws request that no persons be permitted to move in and settle on their country before the land is sold. It is therefore agreed, that no person, whatsoever, who is not Chickasaw or connected with the Chickasaws by marriage, shall be permitted to come into the country and settle on any part of the ceded lands until they shall be offered for sale, and then there shall not be any person permitted to settle on any of the land, which has not been sold, at the time of such settlement, and in all cases of a person settling on any of the ceded lands contrary to this express under-

standing, they will be intruders, and must be treated as such, and put off of the lands of the nation.

5. The Cherokee Treaty of July 19, 1866, 14 Stat. 799, contained a guarantee of quiet and peaceable possession and a promise that the Indians would be protected against intrusions by citizens of the United States.

> ARTICLE 26. The United States guarantee to the people of the Cherokee Nation the quiet and peaceable possession of their country and protection against domestic feuds and insurrections and against hostilities of other tribes. They shall also be protected against interruptions or intrusion from all unauthorized citizens of the United States who may attempt to settle on their lands or reside in their territory. In case of hostilities among the Indian tribes, the United States agree that the party or parties commencing the same shall, so far as practicable, make reparation for the damages done.

It will be observed that in this Treaty the promise of protection against intrusions is made in addition to the guarantee of quiet and peaceful possession. The treaty was negotiated at Fort Smith, Arkansas, at the same time as the Creek and Seminole treaties involved in the instant case and contrasts significantly with them; for the latter treaties contain no promise to prevent intrusions upon Creek or Seminole country.

In other treaties the expression of the governmental obligation to recognize the possession of the Indians has been coupled with a promise that the Indian agent or other officials would remove intruders from the land. Such provisions are found in the following treaties:

1. Sac and Fox Treaty of November 3, 1804 (7 Stat. 84):

> ART. 6. If any citizen of the United States or other white person should form a settlement upon lands which are the property of the Sac and Fox tribes, upon complaint being made thereof to the superintendant or other person having charge of the affairs of the Indians, such intruder shall forthwith be removed.

2. Cherokee Treaty of February 27, 1819 (7 Stat. 195):

> ART. 5. It is agreed * * * that all white people who have intruded, or may hereafter intrude, on the lands reserved for the Cherokees, shall be removed by the United States, and proceeded against according to the provisions of the act passed thirtieth March, eighteen hundred and two, entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers."

The act referred to was the fifth Indian intercourse act, 2 Stat. 139, 141, which stated the terms on which citizens of the United States might go

upon Indian land, and included penalties for violation of the requirements.

3. Creek Treaty of March 24, 1832 (7 Stat. 366):

> ARTICLE V. All intruders upon the country hereby ceded shall be removed therefrom in the same manner as intruders may be removed by law from other public land until the country is surveyed, and the selections made; excepting however from this provision those white persons who have made their own improvements, and not expelled the Creeks from theirs. Such persons may remain 'till their crops are gathered. After the country is surveyed and the selections made, this article shall not operate upon that part of it not included in such selections. But intruders shall, in the manner before described, be removed from these selections for the term of five years from the ratification of this treaty, or until the same are conveyed to white persons.

4. Choctaw and Chickasaw Treaty of June 22, 1855 (11 Stat. 611):

> ARTICLE 7. So far as may be compatible with the constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction, over persons and property, within their respective limits; excepting, however, all persons

with their property, who are not by birth, adoption, or otherwise citizens or members of either the Choctaw or Chickasaw tribe, and all persons, not being citizens or members of either tribe, found within their limits, shall be considered intruders, and be removed from, and kept out of the same, by the United States agent, assisted if necessary by the military, with the following exceptions, viz: Such individuals as are now, or may be in the employment of the government, and their families; those peacefully travelling, or temporarily sojourning in the country or trading therein, under license from the proper authority of the United States, and such as may be permitted by the Choctaws or Chickasaws, with the assent of the United States agent, to reside within their limits, without becoming citizens or members of either of said tribes.

5. Creek Treaty of August 7, 1856 (11 Stat. 699):

ARTICLE 15. So far as may be compatible with the constitution of the United States, and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Creeks and Seminoles shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their respective limits; excepting, however, all white persons, with their property, who are not, by adoption or otherwise, members of either the Creek or Seminole tribe; and all persons not being members of either tribe, found

> within their limits, shall be considered intruders, and be removed from and kept out of the same by the United States agents for said tribes, respectively; (assisted, if necessary, by the military;) with the following exceptions, viz: such individuals with their families as may be in the employment of the government of the United States; all persons peaceably travelling, or temporarily sojourning in the country, or trading therein under license from the proper authority of the United States; and such persons as may be permitted by the Creeks or Seminoles, with the assent of the proper authorities of the United States, to reside within their respective limits without becoming members of either of said tribes.

In a number of cases, Indian tribes have sought to recover from the United States for damages done by trespassers, basing their assertion of liability upon treaty stipulations like those illustrated above. The courts have always held, however, that such stipulations are political expressions of the recognized governmental obligation and do not assume a contractual liability to prevent the tort or respond in damages. *Pawnee Tribe* v. *United States,* 56 Ct. Cl. 1; *Blackfeet et al. Nations* v. *United States,* 81 Ct. Cl. 101; *Nez Perce Tribe of Indians* v. *United States,* 95 Ct. Cl. 1, certiorari denied 316 U. S. 686; cf. *Leighton* v. *United States,* 161 U. S. 291.

Moreover, when the treaty-making authority has been willing to assume responsibility for the

wrongs of third persons, the obligation has been expressly set forth. Such provisions are found in the following treaties:

1. Creek Treaty of January 24, 1826 (7 Stat. 286):

ARTICLE 13

> The United States agree to guarantee to the Creeks all the country, not herein ceded, to which they have a just claim, and to make good to them any losses they may incur in consequence of the illegal conduct of any citizen of the United States within the Creek country.

2. Choctaw and Chickasaw Treaty of June 22, 1855 (11 Stat. 611):

> ARTICLE 14. The United States shall protect the Choctaws and Chickasaws from domestic strife, from hostile invasion, and from aggression by other Indians and white persons not subject to their jurisdiction and laws; and for all injuries, resulting from such invasion or aggression, full indemnity is hereby guaranteed to the party or parties injured, out of the treasury of the United States, upon the same principle and according to the same rules upon which white persons are entitled to indemnity for injuries or aggressions upon them, committed by Indians.

See 17 Op. A. G. 134; 18 Op. A. G. 34.

3. Creek Treaty of August 7, 1856 (11 Stat. 699):

ARTICLE 18. The United States shall protect the Creeks and Seminoles from domestic strife, from hostile invasion, and from aggression by other Indians and white persons, not subject to their jurisdiction and laws; and for all injuries resulting from such invasion or aggression, full indemnity is hereby guaranteed to the party or parties injured out of the treasury of the United States, upon the same principle and according to the same rules upon which white persons are entitled to indemnity for injuries or aggressions upon them, committed by Indians.

4. Kiowa and Comanche Treaty of October 21, 1867, 15 Stat. 581:

ARTICLE 1. From this day forward all war between the parties to this agreement shall forever cease.

The government of the United States desires peace, and its honor is here pledged to keep it. The Indians desire peace, and they now pledge their honor to maintain it. If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Wash-

ington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, *and also reimburse the injured person for the loss sustained.* [Italics supplied.]

A similar provision is found in the treaties concluded with the Cheyenne and Arapaho dated October 28, 1867, 15 Stat. 593; Utes, March 2, 1868, 15 Stat. 619; Sioux, April 29, 1868, 15 Stat. 635; Crows, May 7, 1868, 15 Stat. 649; Navajo, June 1, 1868, 15 Stat. 667; and Shoshone, July 3, 1868, 15 Stat. 673.

The Creek and Seminole Treaties involved in the instant case (which superseded all previous treaties with these tribes) contain no provision corresponding to those quoted above. The omission of any such undertaking is persuasive that it was not intended that the United States should be legally liable for the wrongs done by intruders upon the Creek and Seminole country.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

NORMAN M. LITTELL,
Assistant Attorney General.

VERNON L. WILKINSON,
ARCHIBALD COX
DWIGHT D. DOTY,
WALTER J. CUMMINGS, Jr.,
Attorneys.

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